Supreme Court, U. S.
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No. 80-230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OHIO SUBURBAN WATER COMPANY

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTION PRESENTED

Given the fact that a public utility purchased property in an arm's length transaction, which property when purchased became a part of such utility's rate base upon which the utility lawfully earned income, does the passage some eleven (11) years later of a state statute prohibiting the earning of income on such property constitute a confiscation of property without due process of law?

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NO.

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THE PUBLIC UTILITIES COMMISSION OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner, Ohio Suburban Water Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio (the "Court below"), in the case of Ohio Suburban Water Company v. Pub. Util. Comm., which affirmed a decision of the respondent Public Utilities Commission of Ohio (the "PUC").

OPINIONS BELOW

The Entry of the PUC which was affirmed by the Court below is not reported and is printed in the Appendix hereto at Page 17. The opinion of the Court below, printed in the Appendix hereto at Page 8 is reported as Ohio Suburban Water Company v. Pub. Util. Comm., 62 Ohio St. 2d 17, 402 N.E. 2d 539 (1980). The order of the

Court below denying rehearing is not reported and is printed in the Appendix hereto at Page 16.

JURISDICTION

The Ohio Supreme Court's decision herein was entered on April 2, 1980, and its order denying rehearing was entered on May 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Given the fact that a public utility purchased property in an arm's length transaction, which property when purchased became a part of such utility's rate base upon which the utility lawfully earned income, does the passage some eleven (11) years later of a state statute prohibiting the earning of income on such property constitute a confiscation of property without due process of law?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution, §1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . "

STATEMENT OF THE CASE

In 1965, Ohio Suburban Water Company (Ohio Suburban) purchased, with the approval of the PUC, the net plant of another water company, Huber Utilities, Inc.; a large portion of the plant owned by the seller prior to such sale consisted of water and sewer mains constructed between 1956 and 1964, and paid for by Huber Homes,

Inc., a real estate developer and the parent company of Huber Utilities, and "contributed" by the parent to the subsidiary. Such contributions are not uncommon in the water utility industry and are recorded by utilities as Contributions In Aid Of Construction ("CIAC"). At the time of the 1965 sale to Ohio Suburban, the selling company had recorded CIAC in the amount of $2,787,789 out of a total recorded net plant of $3,867,118, which net plant was purchased by Ohio Suburban for the sum of $2,800,000.

There is no relationship between the selling utility and Ohio Suburban other than that of "buyer and seller", and the transaction was completely at arms' length.

Prior to September 1, 1976, the law of Ohio was:

> [I]f property is "owned" by the utility and "used and useful" for the service of the public, it must be included in the valuation or rate base without regard to the manner in which the property was acquired. In re Marion Water Co. (1973, Pub. Util. Comm. of Ohio), 98 P.U.R. 3d 280 at 286.

In its 1965 authorization of the proposed sale and purchase, the PUC ordered the entire net plant (except for $8,373 determined by the PUC to be CIAC) purchased by Ohio Suburban to be recorded as "Utility Plant", on which Ohio Suburban earned a lawful return until the passage by the Ohio Legislature in 1976, of Am. Sub. Senate Bill 94, Ohio's new rate base law. The passage of this new legislation changed Ohio to an "original cost" utility state, and the legislation was codified in Ohio Revised Code Chapter 4909. Ohio Revised Code § 4909. 15 (A) (1) establishes that a utility's rate base, upon which it may earn income, shall be valued (as to the property in question) as determined by the following pertin-

ent portion of Ohio Revised Code § 4909.05:

> (E) The original cost of . . . property . . . [which] shall be the cost . . . to the person that first dedicated the property to the public use . . . (emphasis added)

The PUC in its opinion and Order of March 8, 1979, found that property belonging to Ohio Suburban that had originally cost $2,779,416, had no cost to Huber Utilities, Inc., the utility that first dedicated the property, and, having had no cost to such dedicating utility, could not be part of any utility's rate base subsequent to the passage of Ohio Revised Code § 4909.05 (E), regardless of how acquired.

The federal constitutional question was raised at the earliest opportunity before the PUC, and is commented on by the PUC in its Opinion and Order (Appendix 25), and before the Ohio Supreme Court and is acknowledged by the Court in the first paragraph of its per curiam opinion (Appendix 10); the federal question was thus timely and properly raised.

REASONS FOR GRANTING THE WRIT

In its Opinion and Order, the PUC stated:

> It does appear to us that the application of Section 4909.05 (E), Revised Code to an arms' length sale of assets between utilities produces an unconstitutional and an inequitable result. However, this Commission as an administrative agency, is without jurisdiction to determine the constitu-

> tionality of a statute.
> (Appendix 25)

The Ohio Supreme Court completely ignored this point of constitutional law in its opinion, stating as the sole reason for its decision:

> It is not disputed that the instant property was donated to Huber Utilities prior to appellant's purchase of the assets of that company and that this property was received as Contributions in Aid of Construction [by Huber Utilities].
> (Appendix 12)

The fact that Ohio Suburban paid $2,800,000 for the property was a fact studiously ignored by the Ohio Supreme Court, although correctly quoting the law that it is "the investment of the shareholder which comprises the rate base," thus quoting Justice Brandeis in Missouri, ex rel. S.W. Bell Tel. Co. v. Public Service Comm., (1923), 262 U.S. 276, 290 as follows:

> The thing devoted by the investor to the public use is *** capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return. (emphasis added)

If Ohio Suburban, the "investor" in the instant case, is denied by the legislature the opportunity to earn any return on its property, which it lawfully purchased and upon which under the law it could earn any income, then the legislature had passed legislation which is unconstitutional when applied to the facts in this proceeding.

This confiscation of the right to earn an income from nearly all of Ohio Suburban's investment of $2,800,000 was recognized by the PUC, and the PUC was careful to explain that it could not pass on constitutional questions. For whatever reasons, the Ohio Supreme Court decided to tacitly permit such confiscation rather to upset Ohio's new rate base law.

It is submitted that it is in the public interest that confiscation of property not be allowed to stand.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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Attorneys for Petitioner,
Ohio Suburban Water Company

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio were sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding this 25th day of July, 1980.

David C. Stradley

OHIO SUBURBAN WATER COMPANY, APPELLANT,
v.
PUBLIC UTILITIES COMMISSION OF OHIO,
APPELLEE.

[Cite as Ohio Suburban Water Co. v. Pub. Util. Comm. (1980), 62 Ohio St. 2d 17.]

Public Utilities Commission — Water service companies — Rate increase — Calculation of rate base — Contributions in Aid Of Construction — R.C. 4909.05 (E), construed — Rate of return determined, how.

(No. 79-880 — Decided April 2, 1980.)

APPEAL from the Public Utilities Commission.

Appellant, Ohio Suburban Water Company, is an Ohio corporation engaged in the business of providing water and sewer services to approximately 10,600 customers in Montgomery County. Appellant is a wholly owned subsidiary of the Consolidated Water Company, located in Florida, a company owned by GAC Utilities, Inc.

On May 3, 1965, appellant filed an application and proposed accounting entries with the Public Utilities Commission, seeking approval of the acquisition of Huber Utilities, Inc., a utility company owned by Huber Homes, Inc., a land development company. Appellant's proposed purchase price was $2,800,000, and included property owned by Huber Utilities which, as of December 31, 1964, was recorded on the books of Huber Utilities as amounting to $3,867,118.03. Of the property owned by Huber Utilities as of that date, $2,787,788.96 was reflected on its books as property donated to the company from other parties and as Contributions in Aid of Con-

struction (CIAC). Of the total CIAC received by Huber Utilities as of December 31, 1964, all but $8,373 represented cash or property contributed to that company by its parent corporation, Huber Homes. In its accounting entries submitted for commission approval in relation to the acquisition of Huber Utilities, appellant carried over as CIAC only $8,373 of the total CIAC reflected on the books of Huber Utilities as of December 31, 1964. On August 18, 1965, appellant's accounting entries and proposed acquisition of Huber Utilities were approved by the commission.

On May 12, 1978, appellant filed an application with the commission seeking a permanent increase in its rates for water and sewer services delivered to its jurisdictional customers. Subsequent to an investigation of the application by the commission's staff, the commission conducted hearings on January 9, 10, and 11, 1979, and entered its opinion and order in the matter on March 8, 1979. In calculating the value of the property includable in appellant's rate base for purposes of determining a fair and reasonable rate of return, the commission assigned a zero value to the property which appellant had carried over from the purchase of Huber Utilities and which had been recorded by Huber Utilities as CIAC. The commission's finding in this regard was predicated upon its staff report, which indicated that Huber Utilities, under the provisions of R.C. 4909.05(E), was "the person that first dedicated the property to the public use," and therefore the property had to be valued at its original cost to Huber Utilities, which was zero. The staff's conclusion was bolstered by the testimony of two witnesses who appeared on appellant's behalf and who indicated that it was Huber Utiltites and not its parent company, Huber Homes, that first dedicated the property in question to the public use.

With respect to the appropriate rate of return, the commission adopted its staff's recommendation of 9.26 percent to 9.57 percent, which was based upon a cost of capital analysis of the consolidated capital structure of appellant's parent company, the Consolidated Water Company. In its application before the commission, appellant had sought a rate of return of 11.76 percent based upon an evaluation of its own capital structure. Notwithstanding the commission's preference for the methodology employed by its staff in computing the appropriate rate of return, it was the commission's finding that a decrease in appellant's existing rate of return of 11.57 percent was not warranted in this cause, because "[a]ny difference in net operating income between the adjusted test year and the pro forma income (under rates which provide a 9.57 % return) would certainly be eroded by the continuing high rate of inflation experienced in the last eight months" since the end of the test year.

Appellant filed an application for rehearing on April 9, 1979, alleging various errors in the opinion and order of the commission. On May 2, 1979, appellant's application for rehearing was denied.

This cause is now before this court upon an appeal as a matter of right.

Messrs. McConnaughey, Stradley, Mone & Maul, Mr. George C. McConnaughey and *Mr. David C. Stradley*, for appellant.

Mr. William J. Brown, attorney general, *Mr. Marvin I. Resnick* and *Mr. Jonathan L. Heller*, for appellee.

Per Curiam. Appellant's initial challenge is founded upon the commission's determination to exclude from appellant's rate base the property which Huber Utilities

received from Huber Homes as CIAC. Under statutory law existing prior to the enactment of Am. Sub. S.B. No. 94 (136 Ohio Laws 202), effective September 1, 1976, this property was includable in the rate base. Appellant contends that the exclusion, under the instant circumstances, amounts to an unconstitutional confiscation of its property in violation of the Fourteenth Amendment to the United States Constitution and Sections 1, 16 and 19 of the Constitution of Ohio.

This court recently addressed a similar argument in *Ohio Utilities Co.* v. *Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 389 N.E. 2d 483. In that case, the utility company received as CIAC substantial quantities of cash and property from development companies owned by the individuals who also held the utility company's stock. These contributions were apparently made prior to the enactment of Am. Sub. S.B. No. 94, and prior to the sale of the utility's stock to another company in 1973. Thereafter, when the General Assembly replaced the reproduction cost new less depreciation method of determining the valuation of rate base property with the original cost method valuation set forth by Am. Sub. S.B. No. 94, the utility challenged the commission's subsequent exclusion of it's CIAC from its rate base under the provisions of R.C. 4909.05 (I) and (J).

In deciding that the implementation of the General Assembly's original cost valuation procedure did not contravene constitutional guarantees of due process, this court recognized that regulation in some instances may diminish the value of the property controlled, but concluded that the presence of this aspect of regulation does not amount to an unconstitutional taking of that property. As indicated in that cause, the rationale for the exclusion of Contribution in Aid of Construction from the value of property upon which a rate of return is guar-

anteed by the Constitution is the well-settled principle in utility law that it is " the investment of the shareholder which comprises the rate base," and "not contributions of others." *Ohio Utilities Co.* v. *Pub. Util. Comm., supra,* at page 161, citing *Missouri, ex rel. S. W. Bell Tel. Co.*, v. *Public Service Comm.* (1923), 262 U.S. 276, 290 (Justice Brandeis dissenting); *Cincinnati* v. *Pub. Util. Comm.* (1954), 161 Ohio St. 2d 395, 119 N.E. 2d 619. It is not disputed that the instant property was donated to Huber Utilities prior to appellant's purchase of the assets of that company and that this property was received as Contributions in Aid of Construction.

Appellant argues also that it was Huber Homes which first dedicated the subject property to "the public use," not Huber Utilities, and therefore the value to be ascribed to the property for purposes of inclusion in appellant's rate base was its original cost to Huber Homes. However, the commission determined that Huber Utilities first dedicated the property in question. This conclusion was based in part upon the recommendation of the staff in its report to the commission, and upon the testimony of appellant's witnesses who indicated that it was Huber Utilities which dedicated or devoted the property to the public use. We are not persuaded that the commission's interpretation of this record should be disturbed. *Cleveland Elec. Illuminating Co.* v. *Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, 330 N.E. 2d 1, certiorari denied, 423 U.S. 986.

Appellant urges further that the commission's use of the consolidated capital structure of appellant's parent utility, in calculating a fair and reasonable rate of return on appellant's rate base, contravenes the provisions of

R.C. 4909.15 (D) (2) (a). *

In determining an appropriate rate of return under the provisions of R.C. 4909.15, the commission is afforded a wide degree of discretion in calculating the cost of capital of the utility whose rates are to be fixed. *Babbit* v. *Pub. Util. Comm.* (1979), 59 Ohio St. 2d 81, 391 N.E. 2d 1376. The provisions of R.C. 4909.15 (A) and (D) do not prevent the Public Utilities Commission from assessing the consolidated capital structure of a utility's parent company in order to determine a fair and reasonable rate of return, if the capital structure of the parent company more reasonably reflects the subsidiary utility's actual cost of capital for rate-making purposes. *Ohio Water Service* v. *Pub. Util. Comm.* (1980), 61 Ohio St. 2d 308,____ N.E. 2d____; *Babbit* v. *Pub. Util. Comm.*, *supra;* cf. *Franklin Co. Welfare Rights Org.* v. *Pub. Util. Comm.* (1978), 55 Ohio St. 2d 1, 12-13, 377 N.E. 2d 990.

The reasonableness of the commission's action in determining the cost of capital herein by reference to the consolidated capital structure of appellant's parent company, is set forth in the commission's order and decision in this cause:

---

* R.C. 4909.15 (D) provides, in part, that the commission, upon concluding that any rate, fare, or charge for services rendered is unreasonable or unjust, shall:

" (2) With *due regard to all such other matters as are proper, according to the facts in each case,*

" (a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

" (b) *** fix and determined the just and reasonable rate *** to be *** charged *** for the *** rendition of the service ***."

(Emphasis added.)

"The staff recommended a rate of return range of 9.26% to 9.57% based upon the consolidated capital structure of the appellant's parent, Consolidated Water Company. Randy G. Farrar, Financial Analyst with the Staff, testified that the cost of capital could not be strictly applied only to the subsidiary (Ohio Suburban) because investors demand a required return which is dependent upon the risk and uncertainty conditions facing the entire company, not just the subsidiary ***. He believed that efficient capital budgeting by the parent company requires that the parent devote resources to the various productive activities up to the point where the expected return on the marginal dollar invested in each activity is equal to the cost of capital of the consolidated entity. In such a case, Mr. Farrar felt that no distinction could be made between the parent company and the subsidiary. The Staff computed the cost of long term debt in the consolidated capital structure of the parent at 8.47% and the cost of perferred stock at 6.19% ***.

" *** [W]e cannot ignore the relationship between the applicant and its parent. Although we recognize that Ohio Suburban does issue its own debt, we are persuaded by the argument of the Staff that the debt investor is not blind to the apparent subsidiary relationship and the fact that substantial portions of Ohio Suburban's capital comes from its parent ***. The fact that Consolidated made advances in September, 1977 to Ohio Suburban to pay off its short term debt and a $625,000 of capital contribution in December negates the proposition that Ohio Suburban is financially independent of its parent ***."

The order of the commission is neither unreasonable nor unlawful and is affirmed.

Order affirmed.

CELEBREZZE, C.J., HERBERT, W. BROWN, P. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1980 TERM*

City of Columbus.

To wit: May 1, 1980

Ohio Suburban Water Company,
Appellant,

vs. *No. 79 - 880*

Public Utilities Commission, of Ohio,
Appellee. REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____ Page _____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 1st *day of* May *1980.*
THOMAS L. STARTZMAN *Clerk.*
By /s/ illegible *Deputy.*

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Suburban Water Company for an increase in the Rates to be Charged and Collected for Water and Sewer Services.	))))	Case No. 77-1512-WS-AIR

OPINION AND ORDER

The Commission, coming now to consider the above-entitled application filed pursuant to Section 4909.18, Revised Code; the exhibits filed with the application; the Staff Report of Investigation issued pursuant to Section 4909.19, Revised Code; the testimony and exhibits introduced into evidence at the public hearings held on January 9, 10, and 11, 1979; and having appointed its Attorney Examiner Stephen M. Howard pursuant to Section 4901.18, Revised Code, to conduct a public hearing and to certify the record directly to the Commission; and being otherwise fully advised in the premises and in compliance with Section 4903.09, Revised Code, hereby issues its Opinion and Order.

APPEARANCES:

Messrs. George, Greek, King, McMahon and McConnaughey, 100 East Broad Street, Columbus, Ohio 43215, by Mr. Charles R. Petree II, Mr. George C. McConnaughey, and Mr. David C. Stradley, on behalf of the applicant, Ohio Suburban Water Company.

Mr. William J. Brown, Attorney General, by Mr. John W. Rudduck and Mr. Jonathan L. Heller, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utili-

ties Commission of Ohio.

HISTORY OF THE PROCEEDINGS:

The Ohio Suburban Water Company (hereinafter referred to as Ohio Suburban or the applicant) is an Ohio corporation engaged in the business of providing water and sewer service to approximately 10,600 customers in the Huber Heights Subdivision in Montgomery County, Ohio. The applicant is wholly owned by Consolidated Water Company of Miami, Florida, which in turn is 99% owned by GAC Utilities, Inc., a subsidiary of GAC, Inc. Ohio Suburban is a public utility, a water-works company and a sewage disposal company within the definition of Sections 4905.02, 4905.03 (A) (8), and 4905.03 (A) (14), Revised Code, and as such, is subject to the jurisdiction of the Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

On December 23, 1977, the applicant filed a notice with this Commission of its intent to file an application for an increase in rates for both water and sewer services. Ohio Suburban proposed a test period beginning July 1, 1977 and ending June 30, 1978 with a date certain of December 31, 1977. By its January 11, 1978 Entry in this matter, the Commission approved the proposed test year and date certain. On May 12, 1978, the applicant submitted an application to the Commission seeking authority to increase its rates. The current rates for both water and sewer services were authorized by Order of this Commission on January 18, 1977 in Case Nos. 75-741-WW-AIR and 75-1122-WS-AIR, and became effective February 17, 1977. The application, as filed May 12, 1978, was not accepted for filing for purposes of Sections 4909.17, 4909.19, and 4909.42,

Revised Code, because it did not comply with the Commission's Standard Filing Requirements. On June 6, 1978, the applicant submitted supplemental schedules S-1 and S-2 and copies of its working papers which, in conjunction with the May 12, 1978 filing, complied with the Commission's Standard Filing Requirements. The Commission accepted the application of Ohio Suburban for a change in water and sewer utility rates to be charged and collected as of June 6, 1978.

A Staff Report of Investigation was filed on October 20, 1978 and was served pursuant to Section 4909.19, Revised Code. The applicant timely filed its objections to the Staff Report on November 20, 1978. In addition to the direct testimony of Mr. James Wittenmyer, Mr. Robert B. Gordon and Mr. William C. Hoelke which was filed on May 12, 1978, Ohio Suburban also filed the direct testimony of Mr. Lyle D. Sullivan and the rebuttal testimony of Messrs. Wittenmyer, Gordon, and Hoelke on December 21, 1978.

The applicant complied with the notice and publication requirements of Sections 4909.18 and 4909.19, Revised Code (Applicant's Exhibit II). Ohio Suburban has also complied with the Commission's Entry of November 29, 1978 by causing a notice of the hearing to be published in a newspaper of general circulation in Montgomery County, Ohio at least fifteen days prior to the hearing date (Applicant's Ex. III). Hearings in this matter were held at the offices of the Commission on January 9, 10, and 11, 1979. This case is now before the Commission for final order.

COMMISSION REVIEW AND DISCUSSION:

The Ohio Suburban Water Company provides water and sewer service to approximately 10,600 customers in the Huber Heights Division of Montgomery County, Ohio. The application covers the applicant's entire service area. The present rates were authorized by the Commission's January 18, 1977 Order in Case No. 75-741-WW-AIR and 75-1122-WS-AIR. The proposed rates, when applied to the test year actual sales volume, would generate additional gross revenues of approximately $486,230 or an increase of 29%.

Rate Base

Both the applicant and the Staff submitted exhibits and testimony in support of the total value of its property actually used and useful in providing water service. The findings of the parties can be summarized as follows:

	Applicant	Staff
Plant in Service	$11,993,463	$11,979,462
Less: Reserve for Accumulated Depreciation	1,678,552	585,462
Net Plant in Service	10,314,911	11,394,129
Plus: Construction Work in Progress	75,740	78,546
Plus: Working Capital	-0-	-0-

Less: Contributions in Aid of Construction	3,482,979	6,262,345
Less: Other Items	18,136	-0-
Total Company Rate Base	6,889,536	5,210,280

The parties stipulated that the Staff figure for "Plant in Service" represented the original cost of the used and useful total plant in service without regard to the source of funding (Tr. III, 67-68).

The major issue in this case involves the valuation to be ascribed to certain property purchased by Ohio Suburban from Huber Utilities, Inc. in 1965. The Commission approved the sale and the accounting entries effecting this sale in its August 18, 1965 Order in Case Nos. 33,138 and 33,139 (Applicant's Ex. IX, Appendix RBG 1). The net property plant and equipment (which was sold to Ohio Suburban) was booked at $3,867,118.03 by Huber Utilities, but the December 31, 1964 balance sheet of Huber Utilities reflected that it had received Contributions In Aid of Construction of $2,787,788.96 (Staff Ex. 2, Appendix A). Ohio Suburban paid $2.8 million for substantially all of Huber Utilities assets in 1965. In the Staff Report, the Staff alleged that the original accounting entries setting up Ohio Suburban's general ledger accounts were in error (Staff Ex. 1, p. 19). However, at the hearing, the Assistant Attorney Gerneral indicated in his opening remarks that the Staff's position on the issue was based upon Section 4909.15 (E), Revised Code (Tr. I, 10-11). That statute requires the Commission to value all kinds and classes of property other than land at the original cost to the first person who dedicated the property to public use. The Staff's argument is simply that Huber Utilities, Inc. was the "person who first dedicated the property to public use" and therefore the property in question should be valued at the original cost to Huber Utilities. Since the balance sheet referred to above indicates that the property in question was donated to Huber Utilities, the Staff believes that Section 4909.05 (E), Revised Code requires a zero value assigned to that property. Ohio Suburban did not attempt to determine the original cost of the property or who actually paid for the property (Tr. I, 93-94). The applicant argued that it should be entitled to earn a return on that $3,867,118.03 which represented the booked value of the property by Huber Utilities in 1964 and the Staff

maintained that Ohio Suburban should only be permitted to earn a return on the noncontributed property or approximately $1 million of the property which was sold to Ohio Suburban.

The Company and the Staff both take the position that Section 4909.05 (I), Revised Code does not apply to this particular set of facts because Ohio Suburban itself was not the donee of the donated or contributed property (Company Brief p. 6 and Staff Reply Brief, p. 6). The "contributed property issue" in In re Ohio Utilities Company, Case No. 77-1073-WS-COI, Opinion and Order dated May 18, 1978, was decided based on an analysis of Section 4909.05 (I), Revised Code. However, this fact does not necessarily mean that this case is totally dissimiliar from In re Ohio Utilities Company, supra. In the Ohio Utilities case, the Davis family held all of the stock of the Ohio Utilities and also owned or controlled land development companies which contributed property to Ohio Utilities from 1962 to 1973. The Davis family sold their stock in 1973 to Citizens Utilities of Arizona, but the name of the utility company still remained Ohio Utilities. As a result, a certain dollar amount was excluded from the rate base of Ohio Utilities pursuant to Section 4909.05 (I), Revised Code because Ohio Utilities received contributions in aid of construction. In this case, Huber Construction and others donated property to Huber Utilities between 1956 and 1965. Huber Utilities then sold its assets to Ohio Suburban in 1965. Therefore, the Commission looks to Section 4909.05 (E), Revised Code, in this case, and not Section 4909.05 (I), Revised Code.

Ohio Suburban made several arguments as to why it felt the Staff position should not be adopted. First, the

applicant maintained that the Commission should be estopped from excluding the $2,779,416 from the rate because it (the Commission) had approved the transfer and the accounting entries effecting such transfer in its August 18, 1965 Order and Ohio Suburban and its creditors had relied on such order. The applicant alleged that by approving the accounting entries which showed only $8,373 to be recorded in Contributions In Aid of Construction, the "stigma of contributed property" was removed (Applicant's Brief, p. 4). It was also pointed out that paragraph 10 of Account 271 of the Uniform System of Accounts for Class A and B Water Utilities does permit the credits to Account 271 to be transferred to surplus or any other account with the approval of the commission, which was obtained by the August 18, 1965 Order. This Commission observes that in that 1965 Order, we specifically indicated that "nothing herein shall be binding upon this Commission in any future proceeding involving rates or service" (Applicant's Ex. IX, Appendix RGB 1, p. 5 of 6). We also did not prescribe the Uniform System of Accounts until early 1971 (Tr. III, 85), but more importantly, the Uniform System of Accounts must yield to any statute (Section 4909.05 (E), Revised Code in this case).

Ohio Suburban also argued that the Staff's assumption that Huber Utilities was the first person which dedicated the property to public use was not supported on the record (Applicant's Reply Brief, p. 6). The Company felt that it was Huber Construction, Inc. (the parent of Huber Utilities, Inc.) and not Huber Utilities which first dedicated the property in question to public use (Applicant's Reply Brief, pp. 7-8). This is not consistent with the testimony of the applicant's witnesses. Both Mr. Gordon and Mr. Hoelke apparently believed that it was Huber Utilities which first dedicated the property to

public use (Tr. I, 83-84 and Applicant's Ex. IV, p. 19). Further, the Company's argument here was based on language contained in the transfer agreement between Huber Construction and Huber Utilities in 1956. However, Appendix C to Staff Exhibit 2 showed that other builders besides Huber Construction contributed property to Huber Utilities. (This Appendix was a copy of page 18 of the December 31, 1964 Annual Report of Huber Utilities.)

The applicant also alleges that if the Staff interpretation of Section 4909.05 (E), Revised Code were correct, then the statute results in an unconstitutional confiscation of Ohio Suburban's property (Applicant's Brief, pp. 7-10). As indicated above, Ohio Suburban paid only $2.8 million for property which was booked at approximately $3.8 million by Huber Utilities in 1964. We approved this sale in our August 18, 1965 Order in Case Nos. 33.138 and 33.139 and specifically found that the value of the transferred property was not less that $2.8 million. It does appear to us that the application of Section 4909.05 (E), Revised Code to an arms' length sale of assets between utilities produces an unconstitutional and an inequitable result. However, this Commission, as an administrative agency, is without jurisdiction to determine the constituitonality of a statute. See Herrick v. Kosydar (1975) 44 Ohio St. 2d 128, 130. We must proceed under the assumption that a statute is constitutional. See East Ohio Gas v. Pub. Util. Comm. (1940) 137 Ohio St. 225, 238-239. We are compelled to conclude that the Staff properly ascribed a zero value to that property which was contributed to Huber Utilities and sold to Ohio Suburban pursuant to Section 4909.05 (E), Revised Code.

Consistent with that finding, we also agree with Staff's adjustment to the depreciation reserve. As the Commission noted in In re Ohio Utilities Company, Case No. 77-1073-WS-COI, Opinion and Order of May 18, 1978 at page 14, "the proper and adequate reserve for depreciation is one that reflects depreciation on only that property which is included in the rate base." The Staff revised its schedules by excluding from depreciation reserve that portion of the accrued depreciation which is attributable to the contributed property (Staff Ex. 2, pp. 9-10). See also the discussion of depreciation expense on page 7 of this Opinion and Order.

The applicant originally excluded $18,136 representing portions of four parcels of land (Coey, Hull, Miami-Erie Canal, and Hamiel) from its rate base. See Applicant's Ex. 1, Schedule B-2.7. The reason for this exclusion, as set forth on Schedule B-2.7, was that in the last rate case (Case No. 75-741-WW-AIR) a portion of the land was not considered to be useful. In its report, the Staff made this same exclusion, indicating that 6.10% of the Coey parcel, 75% of both Hull parcels, 13.67% of the Miami-Erie Canal parcel and 30.40% of the Hamiel parcel should be excluded from the rate base (Staff Ex. 1, pp. 16-17). The Staff arrived at these percentages by applying that the minimum intrusion limit recommended by the Ohio EPA of a 300 foot radius (supra). The applicant filed objections to this exclusion. In his rebuttal testimony, Mr. Wittenmyer stated that these parcels were used and useful since that sat over an aquifer and the wells were sunk in this aquifer (Applicant's Ex. VIII, pp. 2-3). The Staff moved to strike this testimony of Mr. Wittenmyer as well as similar testimony of Mr. Hoelke (Applicant's Ex. X, pp. 11-12) because it felt that it was an attempt to modify the original appli-

cation. (Tr. I, 31 and 110). The attorney examiner denied the motions to strike. Mr. Kenneth Smith of the Staff subsequently testified that in the rate case, the Staff excluded 75% of both Hull parcels, but chould have only excluded 25% (Tr. III,81). In this case, the Staff continued the "error". Mr. Smith indicated that the Staff would be willing to "reserve" this error by excluding only 25% of the Hull properties and including that portion of the Hamiel parcel which was previously excluded. The north part of the Hamiel-Huber parcel has a main that runs through it and therefore it is useful (Tr. III, 82). We would agree with the Staff's motion that the applicant should not be permitted to modify its application by subsequent testimony in this particular case. There is nothing in the record to indicate that circumstances surrounding these parcels had changed between the date the application was filed and the hearing date. The Commission does feel that the Company's rate base should include those revisions suggested by Mr. Smith.

The applicant did not file any objections to the Staff's Schedule 15 which was a depreciation reserve summary nor did it take exception to the Staff recommended depreciation accural rates set forth on Schedule 16 of the Staff Report. Ohio Suburban stipulated to the Staff's figures for Construction Work In Progress of $78,546. The Commission finds that the Staff adjustments to Account 332.1 (Treatment Equipment) and the correction to Account 325.1 (Electrical Pumping Equipment) are reasonable and will be adopted. All other differences in the rate base area were resolved either by the Company withdrawing an objection or the Staff withdrawing a recommendation. We find that for purposes of this case, the value of the applicant's property used and useful in providing water and sewer services to its

customers determined in accordance with Sections 4909.05 and 4909.15, Revised Code, is not less than $5,210,280.

Revenues and Expenses

The applicant submitted exhibits and testimony setting forth its determination of total operating revenues, expenses, and income available for fixed charges during the test year under its present and proposed rates. Ohio Suburban's calculations regarding its present rates may be summarized as follows:

Operating Revenues	$1,675,864
Operating Expenses	1,131,823
Income Available for Fixed Charges	544,046

Under the rates for service which the Company requests, including adjustments, it submits that test year revenues, expenses, and income available for fixed charges would be as follows:

Operating Revenues	$2,162,099
Operating Expenses	1,387,577
Income Available for Fixed Charges	774,522

The Staff investigated the matters set forth in the application and related exhibits. It concluded that under present rates, the applicant's total operating revenues, expenses, and income available for fixed charges during the test year, including adjustments, are as follows:

Operating Revenues	$1,670,580
Operating Expenses	1,068,100
Income Available for Fixed Charges	602,480

It should be noted here that the Staff's Operating Expenses figure is incorrect as the Staff deducted the prior rate expense of $8850 twice. Further, the Federal Income Tax here here was computed at the old rate of 48%. The Staff also concluded that under the proposed rates of the applicant, the applicant's total operating revenues, expenses, and income available for fixed charges during the test year, including adjustments, are as follows:

Operating Revenues	$2,168,629
Operating Expenses	1,308,192
Income Available for Fixed Charges	860,437

The applicant has accepted the Staff figures for revenues, under current and proposed rates as well as the Staff's adjustments for certain operating expenses such as payroll expense, pension expense, postage expense, uncollectible accounts, and other taxes other than income taxes (which is made up of property taxes, excise taxes, and payroll taxes). The difference between the two positions appears to rest in the area of rate case expense, depreciation expense, and the use of the deferred tax credit.

Originally, both the Company and the Staff proposed a $30,000 rate expense. However, the applicant recommended that the rate case expense be amortized over two years while the Staff advocated an amortization period of three years. Additionally, the Company also added the amount which was amortized in the last rate case of $8850 (Applicant's Ex. I, p. 4-5). The Staff proposed excluding the unamortized rate case expenses incurred in Case No. 75-741-WW-Air and 75-1122-WS-AIR.

On rebuttal, Mr Hoelke revised the applicant's rate case expense to $53,000. He stated that the Company had materially underestinated its rate case expense because this was its first filing under the revised standard filing requirements (Applicant's Exhibit X, p. 5). At the request of the Staff, Ohio Suburban filed updated information on the actual or refined estimate to rate case expenses after the hearing. According to that document, the applicant had incurred $57,601 of actual rate case expenses and $5,565 in estimated expenses making a total of $63,166.

Although the Commission generally permits the inclusion of reasonable expenses incurred in the presentation of a particular rate proceeding, we have previously held it to be inappropriate to impose the additional cost of a rate proceeding upon ratepayers when the percentage of increase in authorized gross revenues from the particular rate proceeding is very small. See In re Dayton Power & Light Company, Case No 76-823-EL-AIR, Opinion and Order dated July 22, 1977, at page 11. In this case, we have determined that no additional revenues need be authorized at this time. However, we believe there is a significant distinction between the Dayton Power & Light case and this one. Even though the applicant prevailed on most of the major issues in Dayton Power & Light, the revenues collected under the rates in effect at the time of the hearing did not vary substantially from the revenues ultimately authorized by the Commission in its Order in that case (Dayton Power & Light, supra, pp. 3 and 11). Therefore, we concluded that the application was prematurely filed. That is not the situation here. Rate relief is being denied primarilarly because the Commission does not accept the applicant's position on the major issue of this case (the proper val-

vation of property contributed to Huber Utilities, Inc.). Had the applicant prevailed on this issue, rate relief would have been granted. In addition, the applicant has raided a legitimate question as to the constitutionality of the application of Section 4909.15(E), Revised Code. In view of these facts, we feel that a reasonable rate case expense should be allowed and we will use the applicant's actual rate case expense of $57,601 and its estimated rate case expense of $5,565 or a total of $63,166.

We do agree with the Staff's position that the proper period for amortization is three years. The record reflects that applicant has applied for three rate increases in the last 14 years (Tr. I, 107-108). Further, as this Commisssion has noted before "in fixing an amortization period, it is appropriate to look not only to the experience of a particular applicant, but also to the experience of the industry as a whole". In re Columbus & Southern Ohio Electric Company, Case No. 77-545-EL-AIR, Opinion and Order dated March 31, 1978, at page 24. Mr. Smith indicated that the experience of the Staff with other water and sewer companies and smaller utilities is that a three year period was an appropriate amortization period (Tr. III, 78). We also find that the $8850 representing the amount of the rate case expense amortized in the last rate case should be excluded in calculating the instant rate case expense. We also stated in In re Columbus & Southern Ohio Electric Company supra, "it is far better to adopt an amortization period which will minimize the risk that ratepayers will be subjected to rates which have costs built into them that have already been recovered. The Commission found this consideration to apply with equal force to expenses associated with prior cases which remain unrecovered." We comtinue to follow that philosphy in this case. Therefore we find the appropriate rate case expense to be $63,166 to be amortized over three years, or an annual rate case expense of $21,055.

The applicant also objected to the Staff's elimination of the applicant's depreciation expenses related to the property which was assigned a zero cost as discussed earlier. Mr. Hoelke believed that since such property was used in providing service and so he proposed an increase to the Staff's recommended depreciation expense of $84,751 and $76,460 for water and sewer operations, respectively (Applicant's Exhibit X, Schedules 1.1 and 1.2). He also felt that the purpose of depreciation expense is to create a fund for eventual replacement of the property which the utility has in service. (Tr. I, 110). However, we have rejected the "fund theory" of depreciation in prior cases and continue to so hold in this case. See Case No. 76-492-ST-AIR, In re Woodbran Realty Corporation, Order on Rehearing dated June 21, 1978 and Case No. 77-1073-WS-COI, In re Ohio Utilities Company, Opinion and Order dated May 18, 1978. Rather we have held that the depreciation expense is a mechanism whereby the cost of the consumption of the revenue producing capability of an item is spread out over its life (supra). Where the property in question has been assigned a zero cost, then there are no costs to be recovered. See Woodbran, Case No. 76-492-ST-AIR, Order on Rehearing, June 21, 1978, at page 2. We find that the Staff's depreciation expense of $92,173 is proper.

The Applicant alleged in its objections to the Staff Report that if the Commission used Consolidated Water Company's capital structure in formulating a rate of return, then the "tax credit from parent" of $26,487 would be eliminated. There is no support given by Ohio

Suburban for this argument. We find that regardless of the capital structure employed, the applicant will still be able to utilize the tax credit from its parent.

In addition, we have computed the federal income tax for the test year at 46% rate instead of the former rate of 48%. In summary, the Commission finds that under the present rates, the test year revenues, expenses and income available for fixed charges are $1,670,580, $1,067,578 and $603,002 respectively.

Rate of Return

The Commission notes that by dividing the income available for fixed charges of $603,002 by the rate base of $5,210,280, the resultant rate of return under current rates is 11.57%. The applicant has recommended a rate of return of 11.76% based upon the capital structure of Ohio Suburban (Applicant's Ex. VI, p. 7). Mr. Robert Gordon, testifying on behalf of the applicant, indicated that the embedded cost of long term debt to the applicant was 8.83% as of December 31, 1977 (Applicant's Ex. I, Schedule D-4 and Applicant's Ex. VI, p. 4). He recommended a 14.5% rate of return on equity (Applicant's Ex. VI, p. 9). This was recommended because it would allow the equity investors a dividend yield of 8% at a 55% payout rate, would allow maintainance of a 55%/45% debt equity ratio, and would provide coverage in a range of two times (supra). Mr. Gordon testifies that he looked at these factors and then determined what rate of return would be required in order to achieve these results or goals (Tr. II, 9-11).

The Staff recommended a rate of return range of 9.26% to 9.57% based upon the consolidated capital

structure of the applicant's parent, Consolidated Water Company. Mr. Randy G. Fararr, Financial Analyst with the Staff, testified that the cost of capital could not be strictly applied only to the subsidiary (Ohio Suburban) because investors demand a required return which is dependent upon the risk and uncertainty conditions facing the entire company, not just the subsidiary (Staff Exhibit 3, pp. 3-4). He believed that efficient capital budgeting by the parent company requires that the parent devote resources to the various productive activities up to the point where the expected return on the marginal dollar invested in each activity is equal to the cost of capital to the consolidated entity. In such a case, Mr. Fararr felt that no distinction could be made between the parent company and the subsidiary. The Staff computed the cost of long term debt in the consolidated capital structure of the parent at 8.47% and the cost of preferred stock at 6.19% (Staff Exhibit 3, Table 3A and 4A). It indicated that it could not make a direct discounted cash flow analysis of the cost of equity because Consolidated Water Company has no commonly traded stock (Staff Exhibit 1, p. 25). But Mr. Fararr testified that he used a discounted cash flow methodology to determine the cost of equity faced by five other water companies who were competing in the equity marketplace (Staff Exhibit 3, p.7). These five other water companies were not chosen because they were identical to Consolidated and therefore one could equate their cost of equity with that of Consolidated (Staff Exhibit 3, p.8). Rather, they were chosen because they would be competing with the parent of the applicant for equity dollars and therefore the cost of equity would be similar (supra). The Staff's recommended rate of return for the equity component was 11.5% to 12.5 % (Staff Exhibit 3, p. 10).

We are adopting the Staff's recommended rate of return for two reasons. First, the Company's methodology for determining its rate of return is unreasonable. Mr. Gordon indicated that he looked at a number of factors including coverage, dividends, the dividend payout ratio, and the desired debt-equity ratio and then determined what rate of return was necessary to achieve the desired results (Tr. II, 10-11). This "actual earnings requirements" methodology of determining the rate of return has been previously rejected by the Supreme Court of Ohio in City of Cleveland et. al. v. Public Utilities Commission of Ohio, (1956) 164 Ohio St. 442, 444. Secondly, we cannot ignore the relationship between the applicant and its parent. Although we recognize that Ohio Suburban does issue its own debt, we are persuaded by argument of the Staff that the debt investor is not blind to the apparent subsidiary relationship and the fact that substantial portions of Ohio Suburban's capital comes from its parent (Tr. III, 40-41). The fact that Consolidated made advances in September, 1977 to Ohio Suburban to pay off its short term debt and a $625,000 of capital contribution in December negates the proposition that Ohio Suburban is financially independent of its parent (Applicant's Ex. VI, and Ex. VI, p. 3 and Ex. IX, p. 11). Even two of the four witnesses for the applicant were not employed by Ohio Suburban, but rather were employed by Consolidated's parent (Applicant's Ex. V, p. 1 and XV, p. 1). Therefore, we find that the Staff's recommended rate of return of 9.57% is reasonable.

However, we do not feel that a decrease in rates is warranted in this case. The difference between the adjusted test year revenues and the pro forma revenues

required to give a rate of return of 9.57% is relatively small. It must be noted that the end of the test year and the date certain were over eight and 14 months ago, respectively. Any difference in net operating income between the adjusted test year and the pro forma income (under rates which would provide a 9.57% return) would certainly be eroded by the continuing high rate of inflation experienced in the last eight months. For this reason, the Commission does not feel that a rate decrease is justified.

Rates and Tariffs

There is no evidence indicating that the applicant's current rate designs for both water and sewer services are unreasonable and therefore we find that such rate designs should remain unchanged.

The Staff proposed a change in the wording of the applicant's tariffs with respect to the filing and approval of a contract between the Company and customers whose charge for water and sewer service is not based upon consumption measured by meter (irregular customers). The changes are set forth on page 36 of Staff Exhibit 1. No objection was filed to this recommendation, therefore this Commission directs to file revised tariffs incorporating this change.

The applicant's current tariff provides that a five per cent charge be assessed to the net bill if payment is not made within 14 calendar days after the bill is mailed. The Staff proposed that this grace period be extended from 14 days to 20 days because it believed that the proposed net payment period did not allow for the establishment of reasonable, regular customer payments in response to rendered bills (Staff Ex. 1, p. 35).

Mr. James D. Wittenmyer, vice-president of Ohio Suburban, testified that most of the Company's customers experience no difficulty in making payments within the 14 day time limit (Applicant's Ex. IV, p. 7 and Tr. I, 44). He believed that extending the discount period would not benefit the prompt paying customer but would delay payments and increase write-offs for the customers who are habitual late payers. He doubted that the extension of time would decrease the number of late bills (Tr. I, 46). Additionally, Mr. Wittenmyer felt that a 20 day grace period would likely increase the overtime labor expense because it would decrease the number of bills before the next billing register (Tr. I, 58-59). Mr. Wittenmyer pointed out that four branch banks and a pharmacy in the Huber Heights area serve as collection agencies for Ohio Suburban and that at least one of the agencies is open after Ohio Suburban's regular working hours and on weekends (Tr. I, 70). He also testified that the applicant serves an area adjacent to Wright Patterson Air Force Base which has a heavy turnover in personnel (Tr. I, 65). Ohio Suburban has a turnover in new or changing customers of about 300 to 400 per month (Tr. I, 65). Although the Commission recognizes that it has extended the discounted pay period recently in Case No, 78-141-WW-AIR, In re Country Club Utilities, Inc., Opinion and Order dated January 10, 1979 and Case No. 78-1068-WW-AIR, In re Walnutcreek Water Company, Opinion and Order dated January 30, 1979, we must observe that the factors such as additional the expenses to be incurred, the presence of collection agencies, and the relatively high customer turnover rate of 3% - 4% per month present in this case were not present in those cases cited above. We see no need to change the tariffs in this area at this time.

At the hearing, the Staff modified its original posi-

tion and stated that it was reasonable for the applicant to install a meter, at its option, for construction of residential homes or buildings which take from six months to a year to complete (Tr. II, 34). The Commission finds the request of the applicant to be reasonable and therefore directs the Company to file proposed tariffs which provide for such optional installation of meters for construction of residential dwelling projects which take from six months to a year to complete when the Company has reason to believe that water is being used for other than construction purposes.

Other Staff Recommendations

The Staff made five recommendations on pages 20-21 of its Staff Report in an attempt to facilitate future rate proceedings. We have reviewed these recommendations and find them to be reasonable and well made. Therefore, this Commission directs the applicant to (1) use existing depreciation accrual rates as ordered in Case Nos. 75-741-WW-AIR and 75-1122-WS-AIR except that a composite rate of 1.07% be used for Account 343.1, Water Mains, and 1.14% to be used for Account 343.2, Sewer Mains; (2) adjust plant in service records in accordance with the Staff audit filings, on a timely basis; (3) continue to maintain a pertetual inventory system for Account 346.1, Meters; (4) maintain the work order system for Account 391.3, Office Furniture and tag all property units. We note that the applicant objected only to the fourth recommendation, but no evidence was presented showing why such a recommendation was not reasonable.

FINDINGS OF FACT:

(1) The value of the applicant's property used and useful for the rendition of water and sewer service, determined in accordance with Sections 4909.05 and 4909.15, Revised Code as of the date certain of December 31, 1977 is not less than $5,210,280.

(2) For the twelve month period ending June 30, 1978 the test year in this proceeding, the revenues, expenses and income available for fixed charges realized by the applicant under its existing rate schedule $1,670,580, $1,067,578 and $603,002, respectively.

(3) The net annual compensation of $603,002 represents an 11.57 per cent rate of return on the rate base of $5,210,280.

(4) A rate of return of 11.57 per cent is not insufficient to provide the applicant with reasonable compensation for the water and sewer service it provides its customers.

(5) The applicant's present tariffs regarding the filing of contracts between the applicant and irregular customers should be withdrawn and cancelled.

(6) The applicant should submit new tariffs with respect to the filing of contracts between the applicant and irregular customers and the optional installation of meters during construc-

tion of residential buildings as discussed in this Opinion and Order.

(7) The Staff made five recommendations in an attempt to facilitate future rate case proceedings.

CONCLUSIONS OF LAW:

(1) The application was filed pursuant to, and this Commission has jurisdiction thereof, under the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code, further, the applicant has complied with the requirements in those sections.

(2) The Staff investigation has been conducted and the Staff Report has been filed and served, in accordance with the requirements of Section 4909.19. Revised Code.

(3) A public hearing was held pursuant to Section 4909.19, Revised Code, and legal notice was properly published.

(4) The existing rates and charges are not insufficient to provide the applicant with adequate net compensation and return on its property used and useful in furnishing water service.

(5) The applicant should be authorized to cancel and withdraw its presently effective tariffs respecting the filing of contracts between the applicant and irregular customers.

(6) The applicant should file proposed tariffs consistent with the language contained on page 36 of Staff Exhibit 1 respecting the filing contracts between the applicant and irregular customers and with respect to the optional installation of meters for construction of residential dwelling projects which take from six months to a year to complete when the Company has reason to believe that water is being used for other than construction purposes.

(7) The applicant should implement the five recommendations which were discussed in the Section of this Opinion and Order entitled "Other Staff Recommendations".

ORDER:

It is therefore,

ORDERED, That the application of Ohio Suburban Water Company for authority to increase the rates to be charged and collected for water and sewer services be denied. It is, further,

ORDERED, That the applicant file in final form three (3) complete printed copies of the tariff schedule sheets consistent with the findings respecting the filing of contracts between the applicant and irregular customers and the optional installation of meters on construction of residential building projects which take between six months to a year to complete when the Company has reason to believe that water is being used for other than construction purposes. It is, further.

ORDERED, That the applicant cancel and withdraw its superseded tariffs. It is, further,

ORDERED, That the new tariffs shall become effective immediately upon Commission approval by entry. It is, further.

ORDERED, That the applicant implement all recommendations adopted by the Commission in the Section of this Opinion and Order entitled "Other Staff Recommendations". It is, further,

ORDERED, That all objections and motions not specifically discussed within this Opinion and Order be rendered moot, be overruled and denied. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION
OF OHIO

/s/ illegible Chairman

/s/ illegible Commissioners

Entered in the Journal
March 8, 1979
A True Copy

/s/ David M. Polk
Secretary

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OHIO SUBURBAN WATER COMPANY

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Respondent.

BRIEF OF RESPONDENT PUBLIC UTILITIES COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

The Respondent, Public Utilities Commission of Ohio ("PUCO"), will confine its statement of the case to relevant data not contained within the summary of the proceedings below contained in the Petition for Writ of Certiorari filed with this Court by the Petitioner, Ohio Suburban Water Company ("Ohio Suburban"), and data presented in the Petitioner's summary of the proceedings, with which Respondent disagrees.

On May 12, 1978 Ohio Suburban filed an application seeking a permanent rate increase for its water and sewer service. This application was its first such request for an increase in rates subsequent to the passage of Am. Sub. Senate Bill 94, effective September 1, 1976. The major issue presented in the rate case was how to value property purchased by Ohio Suburban from Huber Utilities Co. ("Huber U"), which had been contributed to Huber U by Huber Homes, Inc. and other parties now unknown. Following the mandate of Ohio Revised Code 4909.05 (E), the PUCO attributed to said property a zero original cost, as it had been first devoted to public use by Huber U at no cost to Huber U. (Prior to the passage of Ohio Revised Code 4909.05 (E), a utility company's property was valued at reproduction cost new less depreciation.) The Ohio Supreme Court recognized that the constitutional issue presented by Ohio Suburban was not one of first impression and it affirmed its recent holding in the case of *Ohio Utilities Co. v Pub. Util. Comm.* (1979) 58 Ohio St. 2d 153, finding Ohio Revised Code 4909.05 a constitutional enactment of the state legislature.

QUESTION PRESENTED

Does the passage of a statute requiring valuation of property for rate making purposes equal to the original cost of said property to the first person dedicating said property to public use, constitute a confiscation of property withqut due process of law of a subsequent purchasing utility company when such purchasing utility company's rate base has been reduced as a result of the passage thereof?

ARGUMENT

Ohio Suburban's writ claiming that the Ohio Supreme Court completely ignored the point of constitutional law in the opinion is totally unfounded. The Supreme Court of Ohio recognized that Ohio Suburban's allegation was similar to that of the Ohio Utilities Company in a previous case.

> This Court recently addressed a similar argument in *Ohio Utilities Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 389 N.E. 2d 483. In that case, the utility company received as CIAC (contribution in aid of construction) substantial quantities of cash and property from development companies owned by the individuals who also held the utility company's stock. These contributions were apparently made prior to the enactment of Am. Sub. S.B. No. 94, and prior to the sale of the utility's stock to another company in 1973. Thereafter, when the General Assembly replaced the reproduction cost new less depreciation

method of determining the valuation of rate base property with the original cost method valuation set forth by Am. Sub. S.B. No. 94, the utility challenged the commission's subsequent exclusion of it's CIAC from its rate base under the provisions of R.C. 4909.05 (I) and (J).

In deciding that the implementation of the General Assembly's original cost valuation procedure did not contravene constitutional guarantees of due process, this court recognized that regulation in some instances may diminish the value of the property controlled, but concluded that the presence of this aspect of regulation does not amount to an unconstitutional taking of that property. As indicated in that case, the rationale for the exclusion of Contribution in Aid of Construction from the value of property upon which a rate of return is guaranteed by the Constitution is the well - settled principle in utility law that it is "the investment of the shareholder which comprises the rate base," and "not contributions of others." *Ohio Utilities Co. v. Pub. Util. Comm., supra,* at page 161, citing *Missouri, ex rel. S.W. Bell Tel. Co., v. Public Service Comm.* (1923), 262 U. S. 276, 290 (Justice Brandeis dissenting); *Cincinnati v. Pub. Util. Comm.* (1954), 161 Ohio St. 2d 395, 119 N. E. 2d 619. It is not disputed that the instant property was donated to Huber Utilities prior to

> appellant's purchase of the assets of the company and that this property was received as Contributions in Aid of Construction. (Petition, App. p. 11, 12)

The specific point of constitutional law upon which Ohio Suburban's claim rested had been litigated before and settled by the Ohio Supreme Court. There is no reason why the Ohio Supreme Court's opinion in Ohio Suburban required a detailed restatement of the constitutional principle followed in *Ohio Utilities supra.* (See *Ohio Utilities supra* p. 159 - 162). Affirmance of that principle in its decision proves that the allegation of the unconstitutionality of Ohio Revised Code 4909.05 had been deliberated and resolved by the Ohio Supreme Court.

The obvious inquiry extending from the above discussion is why did the Ohio Supreme Court fail to address distinguishing factors between Ohio Utilities and Ohio Suburban? Simply stated, there were no distinguishing factors upon which a constitutional issue could be based. In fact, Ohio Suburban's brief before the Supreme Court of Ohio alleging unconstitutionality of the aforementioned statute is almost a word for word replication of Ohio Utilities Company's argument. (See Respondent A. P. 1 - 8).

The Supreme Court of Ohio did not ignore the constitutional principle at issue. Rather, Ohio Suburban refused to admit the stated principle applied to its own set of facts.

Ohio Suburban draws attention to the following language in the PUCO Opinion and Order.

> It does appear to us that the application of Section 4909.05 (E), Revised Code to an arms' length sale of assets between utilities produces an uncon-

> stitutional and an inequitable result. However, this Commission as an administrative agency, is without jurisdiction to determine the constitutionality of a statute. (Petition A p. 25.)

As explained in its brief before the Ohio Supreme Court, the Ohio Suburban Opinion and Order preceded the Court's resolution of the *Ohio Utilities* case. The constitutional principle enunciated in *Ohio Utilities* settled this issue, and the PUCO, abiding by the Court's decision, sought to uphold that principle in the *Ohio Suburban* case.

Ohio Revised Code 4909.05 simply does not cause an unconstitutional taking of property. Original cost rate base laws and "contributed property" provisions are quite common in the United States. Nowhere have these laws been held unconstitutional, especially in light of *FPC v. Hope Natural gas Co.* (1944) 320 U.S. 591. Therein, this Court stated "By such a procedure [use of original cost] the utility is made whole and the integrity of its investment maintained. No more is required." *FPC v. Hope supra,* at 606 (footnotes omitted). Those states in which donated property has been held to have been properly excluded provide an almost inexhaustible source of citations. See for example *Dupage Realty Co. v. Illinois Commerce Comm.* (1971 Ill.), 267 N.E. 2d. 662; *Re Butte Water Co.* (1970 Mont. PSC), 82, PUR 3d. 356; *City of Hagerstown v. Maryland Pub. Service Comm.* (1958 Md. App.), 141 A. 2d. 699; *Re Western Kentucky Gas Co.* (1971 Ky. PSC), 94 PUR 3d. 145, 146; *Re West Kearnsburg Water Co.* (1970 N.J. PSC), 83 PUR 3d. 423; *Southern Gulf Utilities v. Metropolitan Dade County Water & Sewer Board* (1965 Fla. App.), 180 So. 2d. 481; *Mississippi Pub. Ser. Comm. v. Hinds County Water Co.* (1967 Miss.), 195 So. 2d. 71; *Re Michigan Gas Utilities* (1962

Mich. PSC), 47 PUR 3d. 15, 22; *Re Indiana Gas & Water* (1960 Ind. PSC), 35 PUR 3d. 43, 47.

This Court explained that, "The Constitution does not bind rate - making bodies to the service of any single formula or combination of formulas." *Fed. Power Comm. v. Natural Gas Pipeline Co.* (1942) 315 U.S. 575, 586. The formula now being used by the PUCO is "original cost of the first person to dedicate the property to public use." Previously, by the grace of the state legislature, utility companies' property valuation was equal to the reproduction cost new of its existing plant less depreciation. It simply made no difference how the utility company acquired its plant. Now contributed property cannot earn a return.

Ohio Suburban continues to insist that its purchase price must be used for valuation of its rate base despite the inclusion of contributed property within the property purchased. Why did Ohio Suburban pay $2,800,000 for Huber U's property? The property, including contributions in aid of construction, was worth $3,867,118. Did the purchaser - investor, Ohio Suburban, discount the property's value because Ohio was one of the last remaining stalwarts of RCNLD rate making and a change to original cost was imminent? Regardless of motives surrounding the purchase price, the $2,800,000 investment represents the property's ability to earn revenues *at the time of purchase*, not a constitutionally permitted **minimum** rate base. According to Justice Black's concurring opinion in *FPC v. Natural Gas Pipeline, supra*, "rate making is one species of price fixing. Price fixing like other forms of social legislation may well diminish the value of the property which is regulated but that is no obstacle to its validity." *FPC* at 603.

Ohio's diminution of value of Ohio Suburban's investment by its passage of Ohio Revised Code 4909.05 has not reduced Ohio Suburban's rate base below constitutional limitations. There was no original cost to Huber U in

dedicating property contributed to it, to public use. A subsequent purchase by a utility company does not change the fact that the very same contributed property, now owned by a new entity (also a public utility), had a zero original cost to the first person to dedicate said property to public use. The Federal Energy Regulatory Commission's ("FERC") recognition of the necessity of original cost rate making was affirmed by the Ninth Circuit Court of Appeals in its opinion in *Montana Power Co. v. Fed. Energy Reg. Comm.* (9 Circ. 1979), 599 F. 2d 295.

> Because the market value of assets seldom changes precisely in accordance with depreciation, depreciated original cost often is not an accurate proxy of current fair market value. Nonetheless original cost accounting is employed to avoid the difficulties of more subjective methods of property valuation. The original cost method has been applied to property acquisitions by utilities to prevent utilities from artifically inflating their rate bases by acquiring properties at unrealistically high prices. As the FPC has noted, if the original cost concept was not applied to such acquisitions, "all that need be done to raise rates and obtain greater income would be to have one company buy utility properties from another at a higher price than original cost and in this very simple way increase the size of the rate base and increase the cost of service to consumers." *(United Gas Pipe Line Co.* (1961), 25 FPC 26, 64) *Montana Power supra,* at 300.

Even Judge Goodwin in his dissent does not question the need for original cost valuation when an intra - industry sale is at issue. Judge Goodwin did not believe the same reasons for applying original cost rate making to sales within the utility industry existed when sales occurred inter - industry.

> Nowhere does the FERC show us that Congress felt that inter - industry acquisitions presented the likelihood of abuse that intra - industry transfers may once have presented.
> *Montana Power, supra,* Goodwin dissenting at 302.

The question before this Court today does not involve the application of original cost rate making to inter - industry sales. Huber U was a water company subject to the jurisdiction of the PUCO just as Ohio Suburban is. If the employment of original cost rate making to inter - industry sales is weakened by Judge Goodwin's dissent, its application to intra - industry sales is strengthened by the dissent's compelling need to rely on distinguishing the two types of situations in order to denounce the former. Moreover, the majority accepts original cost rate making under both circumstances!

The FERC and numerous state regulatory agencies utilize original cost rate making standards. If Ohio Revised Code 4909.05 is unconstitutional because it causes confiscation of property, those jurisdictions which once had non-original cost statutes now operating under original cost rate making principles would be confiscating utility companies' property. The sensible argument recognizes that rate making does not exist in a vacuum nor is it a stagnant operation. It can cause a reduction (or conceivably an increase) in value of a utility company's rate base; but that change is not a constitutional

infirmity. Since this basic standard has been enunciated by the Supreme Court of the United States before, there are no reasons to grant Ohio Suburban's Petition for Writ of Certiorari in this case.

CONCLUSION

For all the reasons indicated above, Ohio Suburban's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition For a Writ of Certiorari to The Supreme Court of The State of Ohio were sent by United States first class mail, postage prepaid, to counsel representing the parties of record in this proceeding this _____ day of August, 1980.

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APPENDIX

Portion of Brief of Appellant Ohio Suburban Water Co., *Ohio Suburban Water Co. v. Pub. Util. Comm.* (1980), 62 Ohio St. 2d 17.

ARGUMENT

PROPOSITION OF LAW NO. 1

BY EXCLUDING $2,779,416 OF PROPERTY FROM OHIO SUBURBAN'S RATE BASE, WHICH PROPERTY WAS INCLUDED IN $3,867,118 WORTH OF PROPERTY FOR WHICH OHIO SUBURBAN PAID $2,800,000 PRIOR TO SEPTEMBER 1, 1976, AND UPON WHICH PROPERTY OHIO SUBURBAN COULD LAWFULLY EARN A RETURN PRIOR TO SUCH DATE, AM. SUB. S.B. 94 EFFECTIVELY CONFISCATED SUCH PROPERTY IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SECTIONS 1, 16 AND 19 OF ARTICLE I OF THE OHIO CONSTITUTION.

In discussing the constitutional issue, the Commission stated in its Opinion and Order:

> It does appear to us that the application of Section 4909.05 (E), Revised Code to an arm's length sale of assets between utilities *produces an unconstitutional and an inequitable result.* However, this Commission, as an administrative agency, is without jurisdiction to determine the consti-

> tutionality of a statute. (emphasis added)
>
> (Appendix 31)

Prior to September 1, 1976, the law of Ohio was:

> [I]f property is "owned" by the utility and "used and useful" for the service of the public, it must be included in the valuation or rate base without regard to the manner in which the property was acquired. *In re Marion Water Co.* (1973, Pub. Util. Comm. of Ohio), 98 P.U.R. 3d 280 at 286.

Ohio Suburban in 1965 purchased property for $2,800,000 upon which it was entitled under Ohio law to earn a return.

Assuming, *arguendo*, that the Commission is correct in its interpretation (and application to Ohio Suburban) of Revised Code §4909.05 (E), then such legislation is unconstitutional.

Prior to 1976, there was no question that Ohio Suburban was entitled to earn a return on all property owned by it "used and useful" regardless of the source. If this right was in fact destroyed by Am. Sub. S.B. 94, such legislation is null and void.

It is a recognized principle of constitutional law that the legislature may not take property without compensation to its owner; and where a statute has that effect, that statute is unconstitutional and violates not only Sections 1, 16, and 19 of Article I of the Constitution of Ohio, but also the 14th Amendment to the Constitution of the United States of America. *Grieb v. Department of Liquor Control* (1950), 153 Ohio St. 77; *State ex rel. City of Cleveland v. Court of Appeals* (1922), 104 Ohio St. 96 See, generally, 10 O. Jur. 2d, *Constitutional*

Law, § 496.

Both the United States Supreme Court and the Supreme Court of Ohio have held that there need not be a physical confiscation of property to constitute an unconstitutional taking. Where the government's activities in relation to the property constitute a "direct and immediate interference with enjoyment and use" of the property, the government has "taken" the property to the extent that its value has been reduced.*United States v. Causby* (1946), 328 U.S. 256; *State ex rel. Royal v. City of Columbus* (1965), 3 Ohio St. 2d 154.

The *Causby* case is of particular application because in that case the United States Supreme Court recognized that govermental interference with the economic earning capacity of property amounts to an unconstitutional taking.

Ohio Suburban respectfully submits that the Staff's interpretation of Am. Sub. S.B. 94 and the resulting exclusion of property from Ohio Suburban's rate base constitutes just such an unconstitutional confiscation of property. Under prior Ohio law and this Commission's prior rate order for Ohio Suburban, Ohio Suburban has been earning a return on property, whose earning capacity the Staff now seeks to deny under color of R.C. § 4909.05 (E) and § 4909.15. The Staff's interpretation of Am. Sub. S.B. 94 thus has the effect of stripping such property from Ohio Suburban's rate base, and if the Staff's interpretation of such legislation is correct, such legislation is unconstitutional and a nullity.

Portion of Brief of Appellant Ohio Utilities Co., *Ohio Utilities Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153

Proposition of Law No. 5:

> BY EXCLUDING ALLEGED CONTRIBUTIONS IN AID OF CONSTRUCTION FROM APPELLANT'S RATE BASE, AFTER SUCH PROPERTY HAD BEEN INCLUDED IN APPELLANT'S BASE UNDER OHIO'S FORMER UTILITY RATE LAW, AMENDED SUBSTITUTE SENATE BILL 94 EFFECTIVELY CONFISCATED SUCH PROPERTY IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF SECTIONS 1, 16 AND 19 OF ARTICLE I OF THE OHIO CONSTITUTION.

Included in the property of Appellant, actually used and useful for the rendition of its utility services to the public, is $4, 986, 875 of alleged contributions in aid of construction. Over 80% of these amounts represent monies and property contributed to the utility indirectly from its owners, the Davis group. (II App't. Record 305, 205 - 206, 257 - 258) The PUCO applied Ohio's new rate law to exclude these contributions from Appellant's rate base. (I App't. Record 40 at 54) The result was to reduce Appellant's revenues by over half a million dollars per year.

These capital contributions from the Davis group had been made to Appellant from year to year to offset operating losses and to meet construction requirements.

These capital contributions were usually supplied by development companies owned by the Davis group. It didn't make any difference which of the Davis group development companies supplied the capital contributions, as the ultimate source was always the Davis group, which owned Appellant. (II App't. Record 205 - 206, 248 - 250, 257 - 258, 264, 268 - 270, 282 - 283, 305)

Appellant issued no new securities to evidence this continual infusion of funds, as the ownership interests in Appellant did not change as a result of this financing. (II App't. Record 206) From the perspective of the Davis group, these contributions of capital from the development companies were like transfers of investment capital by shareholders from one pocket to another; and the respective interests of the members of the Davis group in Appellant were not affected.

Under Ohio's former rate law, contributions from customers, including contributions of property to a utility, were included in a utility's rate base; and the utility was entitled to earn a rate of return thereon. *In re Marion Water Co.* (1973, Pub. Util. Comm. of Ohio), 98 P.U.R. 3d 280. Thus, the rates of Appellant authorized by the Public Utilities Commission's January 18, 1977, Order, in Case No. 75 - 529 - WS - AIR, included a return on all its contributions.

The PUCO has concluded that treatment was dramatically changed by Amended Substitute Senate Bill 94, which excluded from a utility's rate base

> "Any sums of money or property that the company may have received as total or partial defrayal of the cost of its property..." (R.C. 4909.05 (A) (1)

By excluding Appellant's contributed property from its rate base, the Commission's interpretation of Amended Substitute Senate Bill 94 deprived Appellant of 100%

of the earning capacity of such property.

Amended Substitute Senate Bill 94's treatment of such contributions differed dramatically from its treatment of other utility property. With respect to other utility property, the Bill merely modified the method for calculating its value -- from reconstruction cost new less depreciation to book value less depreciation. With respect to contributions, however, the Commission has interpreted the Bill as completely excluding such property from a utility's rate base -- thus denying the utility any return whatsoever on the property.

Appellant respectfully submits that the exclusion of contributions from its rate base by the Commission's interpretation of Amended Substitute Senate Bill 94, after such contributions had been included in Appellant's rate base under Ohio's former rate law, constitutes an unconstitutional confiscation of Appellant's property. In this case, the confiscation amounted to over 50% of Appellant's property actually used and useful in the rendition of its utility services to the public. (May 18, 1978, Order, p. 15) The result was a substantial reduction of Appellant's annual revenues.

It is a recognized principle of constitutional law that the legislature may not take property without compensation to its owner; and where a statute has that effect, that statute is unconstitutional and violates not only Sections 1, 16, and 19 of Article I of the Constitution of Ohio, but also the 14th Amendment to the Constitution of the United States of America. *Grieb v. Department of Liquor Control* (1950), 153 Ohio St. 77; *State ex rel. City of Cleveland v. Court of Appeals* (1922), 104 Ohio St. 96. See, generally, 10 O. Jur. 2d, *Constitutional Law*, § 496.

Both the United States Supreme Court and the Supreme Court of Ohio have held that there need not be a physical confiscation of property to constitute an unconstitutional taking. Where the government's activities in relation to the property constitute a "direct and im-

mediate interference with the enjoyment and use" of the property, the government has "taken" the property to the extent that its value has been reduced. *United States v. Causby* (9146), 328 U.S. 256; *State ex rel. Royal v. City of Columbus* (1965), 3 Ohio St. 2d 154.

The *Causby* case is of particular application because in that case the United States Supreme Court recognized that governmental interference with the economic earning capacity of property amounts to an unconstitutional taking.

Appellant respectfully submits that the PUCO's interpretation of Amended Substitute Senate Bill 94 to exclude contributions from Appellant's rate base constitutes just such an unconstitutional confiscation of property. Under prior Ohio law and the PUCO's prior rate order for Appellant, Appellant had been earning a return on property, whose earning capacity the Commission now seeks to deny under R.C. 4909.05 (I) and 4909.15, The Commission's interpretation of Amended Substitute Senate Bill 94 thus has the effect of stripping such property of its economic earning capacity through the exclusion of such property from Appellant's rate base.

Appellant respectfully submits that those portions of R.C. 4909.05 (I) and 4909.15 which the Commission has interpreted erroneously to confiscate Appellant's alleged contributions are unconstitutional. The Commission's reliance thereupon is a nullity and must be reversed.

Proposition of Law No. 6:

> CONTRIBUTIONS OF MONEY OR PROPERTY RECEIVED BY A PUBLIC UTILITY FROM ITS OWNERS ARE NOT PROPERLY EXCLUDABLE FROM A UTILITY'S RATE

BASE PURSUANT TO THE PROVISIONS OF R.C. 4909.05 (I).

As discussed under proposition of law No. 5 above, the Public Utilities Commission relied upon R.C. 4909.05 (I) to exclude from Appellant's rate base over 50% of Appellant's property actually used and useful in the rendition of its utility services to the public. The effect of this exclusion was to deny Appellant any rate of return on such contributions and thus to reduce Appellant's annual revenues by approximately half a million dollars per year. See generally, R.C. 4909.15 (A) (1).

OHIO REVISED CODE SECTION 4909.05

4909.05 Report of valuation of property

As used in section:

(A) A "lease purchase agreement" is an agreement pursuant to which a public utility leasing property is required to make rental payments for the term of the agreement and either the utility is granted the right to purchase the property upon the completion of the term of the agreement and upon the payment of an additional fixed sum of money or title to the property vests in the utility upon the making of the final payment.

(B) A "leaseback" is the sale or transfer of property by a public utility to another person contemporaneously followed by the leasing of the property to the public utility on a long term basis.

The public utilities commission shall prescribe the form and details of the valuation report of the property of each public utility or railroad in the state. Such report shall include all the kinds and classes of property, with the value of each, owned or held by each public utility or railroad used and useful for the service and convenience of the public. Such report shall contain the following facts in detail:

(C) The original cost of each parcel of land owned in fee and in use at the date certain determined by the commission; and also a statement of the conditions of acquisition, whether by direct purchase, by donation, by exercise of the power of eminent domain, or otherwise;

(D) The actual acquisition cost, not including periodic rental fees, of rights - of - way, trailways. or other land rights held by virture [*sic*] of easements, leases or other forms of grants of right as to usage;

(E) The original cost of all other kinds and classes of property used and useful in the rendition of service to the public. Such original costs of property, other than

land owned in fee, shall be the cost, as determined to be reasonable by the commission, to the person that first dedicated the property to the public use and shall be set forth in property accounts and subaccounts as prescribed by the commission.

(F) The cost of property constituting all or part of a project leased to or used by the utility under Chapter 165., 3706., 6121 or Code 6123. of the Revised Code and not included under division (E) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;

(G) In the discretion of the commission, the cost to a utility, in an amount determined to be reasonable by the commission of property constituting all or part of a project leased to the utility under a lease purchase agreement or a leaseback and not included under division (E) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;

(H) The proper and adequate reserve for depreciation, as determined to be reasonable by the commission;

(I) Any sums of money or property that the company may have received as total or partial defrayal of the cost of its property;

(J) The valuation of the property of the company shall be the sum of the amounts contained in the report pursuant to divisions (C), (D), (E), (F), and (G) of this section, less the sum of the amounts contained in the report pursuant to divisions (H) and (I) of this section.

The report shall show separately the property used and useful to such public utility or railroad in the furnishing of the service to the public and the property held by such public utility or railroad for other purposes, and such other items as the commission deems proper. The commission may require an additional report showing the extent to which the property is used and useful. Such reports shall be filed in the office of the commis-

sion for the information of the governor and the general assembly.

HISTORY: 1976 S 94, eff. 9 - 1 - 76
GC 499-9